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No. 87-1080

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

MARYLAND NATIONAL BANK,

Appellant,

v.

STATE DEPARTMENT OF ASSESSMENTS AND TAXATION,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF MARYLAND

SUPPLEMENTAL BRIEF IN RESPONSE TO THE BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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Maryland National Bank,[1] Appellant, submits this Supplemental Brief in

[1] A listing of Maryland National Bank's parent company, subsidiaries (except wholly owned subsidiaries) and affiliates is found on pages ii and iii of its Jurisdictional Statement.

Response to the Brief For The United States As Amicus Curiae, and states as follows:

1. The United States, as Amicus Curiae (hereinafter "Amicus"), agrees that the meaning of §1433 is not entirely clear (Amicus Br. at 4). Moreover, Amicus does not disagree that the issue raised under §1433 has never been decided by this Court.

2. Amicus does agree with Maryland National Bank that the parenthetical in 12 U.S.C. §1433, expressly permitting the imposition of certain direct and indirect state taxes on FHLB bonds, but not permitting state franchise taxes, supports the Bank's position. (Amicus Br. at 9). Moreover, Amicus notes that the Bank's argument regarding the

parenthetical in §1433 "has force." (Amicus Br. at 11).

3. In its Jurisdictional Statement, the Bank argued that: "Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of contrary legislative intent." Andrus v. Glover Construction Co., 446 U.S. 608, 616-17 (1980). See also, American Bank and Trust Co. v. Dallas County, 463 U.S. 855 (1983). On March 23, 1988, this Court reaffirmed the principle that if a statute provides a general prohibition of taxation, and also grants exceptions, no other exceptions are implied. United States v. Wells Fargo Bank, _____ U.S. _____, 108 S. Ct. 1179 (1988). In Wells Fargo, the Court considered the language

in §20 of the Housing Act of 1937, which provided for certain bonds to be exempt "from all taxation (except surtaxes, estate, inheritance and gift taxes) now or hereafter imposed * * *." Id. at 1183. This Court noted that Congress intended to exempt the bonds only from the normal income tax, and not from the existing surtax. It noted that Congress, by excepting surtaxes, recognized that such exception would imply that no taxes other than surtaxes would be permitted:

> * * * But that exception, if left by itself, would have created its own anomaly: the strict application of the rule "expressio unius est exclusio alterius:--i.e., the expression of one is the exclusion of others -- would have resulted in exempting these obligations from all taxes, direct or indirect, except the surtax. To

> avoid that particular pitfall, Congress also excepted estate, inheritance and gift taxes from 20(b). * * *

Id. at 1183.

In Wells Fargo, this Court contrasted the provisions of §20 of the Housing Act of 1937, with its parenthetical, to the controlling provisions of §5, which had no parenthetical.

The language construed in Wells Fargo is contained in 12 U.S.C. §1433. The instant appeal squarely presents the issue, mentioned in dicta in Wells Fargo, concerning the proper interpretation of the parenthetical language in §1433. The misinterpretation of that language by the Court of Appeals of Maryland is hopelessly at odds with Wells Fargo.

4. Amicus agrees that the rules of statutory construction established by this Court would otherwise lead to the conclusion that §1433 prohibits a state franchise tax. Nevertheless, Amicus feels that Congress may have intended to permit interest earned on FHLB bonds to be included in the measure of state franchise taxes. In a somewhat contradictory analysis, Amicus reasons that Congress knew that the original bill, which prohibited all state taxation of FHLB bonds, did not necessarily preclude an indirect state tax such as a franchise tax. Based on the legislative history, Amicus suggests that the parenthetical of exceptions in §1433 was added to narrow the exemption and should not be construed as expanding the prohibition to include franchise

taxes. (Amicus Br. at 11). However, if it is assumed that Congress was aware of this Court's decisions permitting indirect taxes to be imposed on otherwise exempt obligations, Congress would not have seen fit to include a parenthetical for indirect taxes (such as estate, inheritance and gift taxes) unless it was intending to specify only those indirect taxes which were permitted. On the other hand, if it is assumed that Congress was not aware of this Court's decisions, then the plain language of §1433 permitting certain indirect state taxes (but not the franchise tax) indicates that Congress did not intend for FHLB bonds to be subject to state franchise taxes.

Thus, in either event, it is apparent from the legislative history and the

statutory language that Congress intended to specify those direct and indirect taxes that would be permitted. It would be perverse not to give effect to the language used by Congress and its specified intent. Further, if there is to be a disavowal of the principles of statutory construction found to be controlling by this Court under similar circumstances in American Bank & Trust Co. v. Dallas County, 463 U.S. 855 (1983), and under identical circumstances in Wells Fargo, it is respectfully submitted that this should be done by way of plenary review by this Court under its mandatory jurisdiction.[2]

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[2] See, e.g., Rockford Life Ins. Co. v. Ill. Dept. of Revenue, ___ U.S. ___, 107 S. Ct. 2312, 2314 n.3 (1987).

5. Recognizing that the basic rules of statutory construction established by this Court preclude the creation of additional exceptions to those set forth in the parenthetical in §1433, Amicus suggests that the language of the parenthetical in §1433 was not chosen with care. (Amicus Br. at 12). This hardly comports with the legislative history of §1433, where it was stated by one Congressman: "Never in a somewhat long legislative experience have I known of a measure that has been more carefully studied in every page, every paragraph, every sentence, every word." (75 Cong. Rec. 12,594) (1932).

Moreover, the text of §1433 cannot be brushed aside as aberrational. Congress has enacted numerous tax exemption statutes with the same parenthetical

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language. See 12 U.S.C. §§1441(e)(8) (Financing Corporation), 1725(e) (Federal Savings and Loan Insurance Corporation), 1739(d) (War Housing Insurance), 1747g(g) (Insurance for Investments in Rental Housing), 1748b(f) (Armed Services Housing Mortgage Insurance), 1750c(d) (National Defense Housing Insurance), 1825 (Federal Deposit Insurance Corporation), 2098 (Production Credit Associations), 2134 (Bank for Cooperatives), 15 U.S.C. §713a-5 (Commodity Credit Corporation), 16 U.S.C. §831n-4 (Tennessee Valley Authority), and 39 U.S.C. §2005(d)(4) (Postal Service). Thus, the language in §1433 was carefully drafted and has been repeatedly used by Congress. This language therefore merits interpretation by this Court.

6. In addition to the numerous federal statutes containing the same parenthetical tax exemption language found in §1433, more than twenty (20) states (including California, New York, Massachusetts and Florida), as well as Maryland, impose franchise taxes measured by interest earned on FHLB bonds. These states are more plentiful and economically powerful than the handful of states which imposed bank shares taxes of the type reviewed in American Bank & Trust Co, supra.

7. The primary issue in this appeal concerns the construction of §1433. Amicus correctly notes that 31 U.S.C. §3124(a) is not applicable to this case because FHLB bonds are not obligations of the United States (Amicus Br. at 9, n.5). Amicus points out that the Court

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of Appeals of Maryland erred in its holding that §3124(a) applies to FHLB bonds. This erroneous conclusion was central to the decision of the Court of Appeals for rejecting the Bank's position. The Court of Appeals labored under the misapprehension that a correct interpretation of §1433 would have created an irreconcilable conflict with §3124(a). (J.S. App. 6a-8a). A decision by this Court is necessary to repudiate the demonstrably incorrect interpretation of §3124(a) by the Court of Appeals.

CONCLUSION

For the reasons set forth herein, and in the Jurisdictional Statement, Maryland National Bank respectfully submits that the questions presented in this case are substantial and that this Court should note probable jurisdiction.

Respectfully submitted,

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